

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KEVIN CAVERLY,

Plaintiff,

v.

WALMART INC. and COCA-COLA
BEVERAGES NORTHEAST, INC., f/k/a COCA-
COLA BOTTLING COMPANY OF NORTHERN
NEW ENGLAND, INC.,

Defendant.

NOTICE OF REMOVAL

Case №.

PLEASE TAKE NOTICE that Defendant Walmart Inc. (“Removing Defendant”), by its attorneys, Bennett Schechter Arcuri & Will LLP, and pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, files this Notice of Removal of the action styled *Kevin Caverly, Plaintiff, versus Walmart Inc. and Coca-Cola Beverages Northeast, Inc., f/k/a Coca-Cola Bottling Company of Northern New England, Inc.* (the “Action”), from the Supreme Court of the State of New York, County of Monroe, to the United States District Court for the Western District of New York.

In support thereof, the Removing Defendant states:

1. On January 1, 2020, the Plaintiff, Kevin Caverly (“Plaintiff”), commenced the Action by filing a Summons and Complaint in the Supreme Court of the State of New York, County of Monroe. A copy of the Summons and Complaint are attached hereto as **Exhibit A**.
2. On March 27, 2020, the Removing Defendant appeared in the Action by serving its Answer, a copy of which is attached hereto as **Exhibit B**.
3. On July 14, 2020, the Co-Defendant, Coca-Cola Beverages Northeast, Inc., f/k/a Coca-Cola Bottling Company of Northern New England, Inc., appeared in the Action by

serving its Answer, a copy of which is attached hereto as **Exhibit C**.

4. A Scheduling Order was entered in the Action on September 1, 2020, a copy of which is attached hereto and incorporated herein by reference as **Exhibit D**.

5. On March 27, 2020, the Removing Defendant served upon the Plaintiff a request for a supplemental demand setting forth the total damages to which the Plaintiff deemed himself entitled in the Action, pursuant to N.Y. CPLR 3017(c). The Removing Defendant reiterated that request by correspondence dated May 1, 2020; June 1, 2020; July 2, 2020; and August 6, 2020. A copy of the Removing Defendant's CPLR 3017(c) request and subsequent correspondence is attached hereto as **Exhibit E**.

6. The Plaintiff has not responded to those repeated requests for a supplemental demand pursuant to CPLR 3017(c).

7. Accordingly, on August 27, 2020, the Removing Defendant served upon the Plaintiff a Notice to Admit, pursuant N.Y. CPLR 3123, requesting that the Plaintiff admit that the total damages to which he deems himself entitled in the Action exceed the sum or value of \$75,000, exclusive of interest and costs. A copy of the Removing Defendant's Notice to Admit is attached hereto as **Exhibit F**.

8. The Plaintiff has not responded to the Removing Defendant's Notice to Admit. Pursuant to N.Y. CPLR 3123, the matters contained in the August 27, 2020 Notice to Admit are deemed admitted if they are not answered within 20 days. Accordingly, as of September 17, 2020, the Plaintiff has admitted by operation of law that the damages to which he deems himself entitled in the Action exceed the sum or value of \$75,000, exclusive of interest and costs. Thereafter, on September 24, 2020, counsel for the Plaintiff confirmed by email correspondence that his nonresponse to the August 27, 2020 Notice to Admit was intended to constitute an

admission, and that the Plaintiff deems himself entitled to damages in excess of \$75,000 in the action. A copy of said email correspondence from counsel for the Plaintiff is attached hereto as **Exhibit G**.

9. The Plaintiff, Kevin Caverly, is an individual domiciled in the State of New York and, therefore, for the purposes of this Notice of Removal, is a citizen of the State of New York. *See* Ex. A.

10. Defendant Walmart Inc. is a corporation organized under the laws of the State of Delaware, with a principal place of business located in Arkansas and, therefore, for the purposes of this Notice of Removal, is a citizen of the States of Delaware and Arkansas.

11. Defendant Coca-Cola Beverages Northeast, Inc., f/k/a Coca-Cola Bottling Company of Northern New England, Inc. is a corporation organized under the laws of the State of Delaware, with a principal place of business located in New Hampshire and, therefore, for the purposes of this Notice of Removal, is a citizen of the States of Delaware and New Hampshire. *See* Corporate Entity Information for Coca-Cola Beverages Northeast, Inc., attached hereto as **Exhibit H**.

12. This Court has original subject matter jurisdiction over the Action pursuant to 28 U.S.C. §§1332(a) and 1441(b), because (a) there is complete diversity of citizenship among the parties; (b) the amount in controversy exceeds the sum of seventy-five thousand dollars (\$75,000.00), exclusive of interest and costs; and (c) none of the parties in interest who are properly joined and served as Defendants are a citizen of New York State. The Action may, therefore, be removed pursuant to 28 U.S.C. § 1441(b).

13. This Notice of Removal is timely under 28 U.S.C. § 1446(b)(3) and (c), because it is filed within thirty (30) days of the Removing Defendant's receipt of the Plaintiff's

admission that the damages to which he deems himself entitled in the Action exceed the statutory threshold (such admission constituting the other paper from which it was first ascertainable that the case is removable), and within one (1) year of commencement of the Action.

14. Pursuant to 28 U.S.C. § 1446(b)(2), all Defendants who have been properly joined and served consent to the removal of the Action. Email correspondence from counsel for Co-Defendant Coca-Cola Beverages Northeast, Inc., f/k/a Coca-Cola Bottling Company of Northern New England, Inc., consenting to the removal of the Action, is attached hereto as **Exhibit I**.

15. Pursuant to 28 U.S.C. § 1441(a), removal venue exists in the United States District Court for the Western District of New York, because the Supreme Court, Monroe County (the Court in which the Action was originally filed) is within the jurisdiction of the Western District of New York.

16. Pursuant to 28 U.S.C. § 1446(a), all process, pleadings, and orders served to date upon the Removing Defendant are appended hereto. Pursuant to Local Rule 81(a)(3), an index of all documents filed in the state court action is attached hereto as **Exhibit J**.

17. Pursuant to 28 U.S.C. § 1446(d), written notice of the filing of this Notice of Removal has been served upon the Plaintiff and the Co-Defendant and has been filed with the Clerk of the Supreme Court, Monroe County. *See* Notice of Filing of Notice of Removal, with Affidavit of Service, attached hereto as **Exhibit K**.

18. The Removing Defendant reserves the right to amend or supplement this Notice of Removal.

WHEREFORE, the Removing Defendant requests that the case styled *Kevin Caverly, Plaintiff, versus Walmart Inc. and Coca-Cola Beverages Northeast, Inc., f/k/a Coca-Cola*

Bottling Company of Northern New England, Inc., Defendants, Supreme Court of the State of New York, County of Monroe, Index №. E2020000063, be removed to this Court, and that this Court take subject matter jurisdiction over the Action.

Dated: Buffalo, New York
October 1, 2020

Yours, etc.,

/s/ *Pauline C. Will*

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